

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs (1965 –)

---

1979

# Terry Lynne Jones v. William K. Hinkle and Kathryn P. Hinkle : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Joseph L. Henriod; Stephen L. Henriod; Attorneys for Plaintiff-Appellant;  
Dean L. Gray; Gustin, Adams, Kasting & Liapis; Attorneys for Defendants-Respondents;

---

### Recommended Citation

Brief of Appellant, *Jones v. Hinkle*, No. 16525 (Utah Supreme Court, 1979).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/1783](https://digitalcommons.law.byu.edu/uofu_sc2/1783)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

|                        |   |                |
|------------------------|---|----------------|
| TERRY LYNNE JONES,     | ) |                |
| Plaintiff-Appellant    | ) |                |
| vs.                    | ) | Case No. 16525 |
| WILLIAM K. HINKLE and  | ) |                |
| KATHRYN P. HINKLE,     | ) |                |
| Defendants-Respondents | ) |                |

---

APPELLANT'S BRIEF

---

Appeal from the Third Judicial District  
Court of Salt Lake County, Utah  
Honorable Christine M. Durham, Judge

---

Joseph L. Henriod  
Stephen L. Henriod  
NIELSEN, HENRIOD, GOTTFREDSON & PECK  
400 Newhouse Building  
Salt Lake City, Utah 84111  
Attorneys for Plaintiff-Appellant

Dean L. Gray  
GUSTIN, ADAMS, KASTING & LIAPIS  
1000 Boston Building  
9 Exchange Place  
Salt Lake City, Utah 84111  
Attorneys for Defendants-Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

|                        |   |                |
|------------------------|---|----------------|
| TERRY LYNNE JONES,     | ) |                |
| Plaintiff-Appellant    | ) |                |
| vs.                    | ) | Case No. 16525 |
| WILLIAM K. HINKLE and  | ) |                |
| KATHRYN P. HINKLE,     | ) |                |
| Defendants-Respondents | ) |                |

---

APPELLANT'S BRIEF

---

Appeal from the Third Judicial District  
Court of Salt Lake County, Utah  
Honorable Christine M. Durham, Judge

---

Joseph L. Henriod  
Stephen L. Henriod  
NIELSEN, HENRIOD, GOTTFREDSON & PECK  
400 Newhouse Building  
Salt Lake City, Utah 84111  
Attorneys for Plaintiff-Appellant

Dean L. Gray  
GUSTIN, ADAMS, KASTING & LIAPIS  
1000 Boston Building  
9 Exchange Place  
Salt Lake City, Utah 84111  
Attorneys for Defendants-Respondents

# TABLE OF CONTENTS

|  |    |
|--|----|
| NATURE OF THE CASE . . . . .   | 1  |
| DISPOSITION IN THE LOWER COURT . . . . .   | 1  |
| RELIEF SOUGHT ON APPEAL . . . . .  | 2  |
| STATEMENT OF FACTS . . . . .   | 2  |
| ISSUES . . . . .   | 7  |
| ARGUMENT . . . . .   | 8  |
| POINT I  |    |
| THE LOWER COURT ERRED IN HOLDING THAT<br>PLAINTIFF-APPELLANT HAD NO RIGHT TO<br>ASSUME THE UNDERLYING OBLIGATION ON<br>THE REAL PROPERTY . . . . . | 8  |
| POINT II   |    |
| IT WAS IMPROPER TO GRANT DEFENDANTS'<br>MOTION FOR SUMMARY JUDGMENT . . . . .  | 14 |
| POINT III  |    |
| THE LOWER COURT ERRED IN AWARDED<br>ATTORNEY'S FEES TO THE DEFENDANT<br>AND NOT TO THE PLAINTIFF . . . . .   | 16 |
| CONCLUSION . . . . .   | 17 |
| MAILING CERTIFICATE . . . . .  | 17 |

## CASES CITED

|  |        |
|--|--------|
| Continental Bank and Trust Co. v. Bybee, 6 U.2d 98,<br>306 P.2d 733, (1957) . . . . .                                    | 11, 13 |
| Daly v. Old, 35 Utah 74, 99 Pac. 460, (1909) . . . . .   | 14     |
| Hartman v. Potter, No. 16004, (Utah,<br>filed June 1, 1979) . . . . .  | 9, 11  |
| Holbrook Co. v. Adams, 542, P.2d 191 (Utah, 1975) . . .  | 15     |
| Kier v. Condrack, 24 U.2d 139, 478 P.2d 327, (1970) . .  | 9, 13, |
| Oregon Shortline Railroad Co. v. Idaho Stickyard Co.,<br>124 U.2d 205, 365 P.2d 826, (1961) . . . . .                    | 14     |
| Sandberg v. Klein, 576 P.2d 191 (Utah, 1975) . . . . .   | 14, 15 |
| Western Pacific Transport Co. v. Beehive State<br>Agricultural Co-op, No. 16056, (Utah<br>filed June 26, 1979) . . . . . | 15     |

## OTHER AUTHORITIES CITED

|  |    |
|--|----|
| Blacks Law Dictionary, West Publishing Co.,<br>4th Ed., p. 608, 1951 . . . . . | 10 |
|--|----|

IN THE SUPREME COURT OF THE STATE OF UTAH

|                         |   |                |
|-------------------------|---|----------------|
| TERRY LYNNE JONES,      | ) |                |
| Plaintiff-Appellant     | ) |                |
| vs.                     | ) | Case No. 16525 |
| WILLIAM K. HINKLE and   | ) |                |
| KATHRYN P. HINKLE,      | ) |                |
| Defendants-Respondents. | ) |                |

---

APPELLANT'S BRIEF

---

NATURE OF THE CASE

This is an action for damages and for specific performance of certain provisions in a uniform real estate contract.

DISPOSITION IN THE LOWER COURT

The lower court granted Defendants' Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment, granting Defendants an award of attorney fees and holding that in spite of a contract provision stating that when the principal due under the contract was reduced to the amount of outstanding loans and mortgages secured or maintained by Sellers that Sellers agreed to convey and Buyers agreed to accept title to the property subject to the loans and mortgages, Sellers had no obligation to convey and Buyer had no right to obtain title even if Buyer had paid the principal balance down to an amount equaling the balance owing on the outstanding

obligation to Deseret Federal Savings and Loan.

#### RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the decision of the lower court reversed, vacating the Summary Judgment and award of attorney fees granted to Defendant and to have the case remanded for entry of Judgment and award of attorney fees on behalf of Plaintiff-Appellant.

#### STATEMENT OF FACTS

The facts giving rise to the case are as follows: On or about May 12, 1977 Plaintiff and Defendants executed and entered into an installment real estate contract. (TR. 38) A standard form Uniform Real Estate Contract blank (form 106 which states that it has been approved by the Utah Securities Administration and the Utah State Board of Realtors) was used in setting forth the terms of contract, (TR. 13) No terms in said form contract were changed or deleted. (TR. 13) The property is residential in nature and is located in Utah County, Utah. (TR. 13)

The essential terms, other than parties and description, specific to this transaction are found in paragraphs 3, 4, 6, 8, 9, and 21, as follows:

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Sixty five thousand and no/100--- Dollars (\$65,000.00) payable at the office of Seller, his assigns or order strictly within the following times, to-wit: Twenty five thousand and no/100--- (\$25,000.00) cash, the receipt of which is hereby acknowledged, and the balance of \$40,000.00 shall be paid as follows:

Three hundred thirteen dollars and sixty cents or more on or before the 12th day of June and Three hundred thirteen dollars and sixty cents on or before the 12th day of each month thereafter until contract balance is paid in full, together with all interest accrued and in addition Buyer to make one balloon payment in the amount of \$8,163.22 (Eight thousand one hundred sixty-three and twenty-two cents) on or before May 12, 1978. Said payment to include 1/12th of property taxes and 1/12 of hazard insurance monthly. If taxes and insurance increase, monthly payments to be adjusted accordingly. The buyers shall pay interest on the balloon payment of 9 1/2 interest until paid in full.

Possession of said premises shall be delivered to buyer on the 12th day of May, 1977.

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from May 12, 1977 on all unpaid portions of the purchase price at the rate of nine & one-half percent (9 1/2%) per annum. The Buyer at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be able at the time the excess payment is made.

. . .

6. It is understood that there presently exists an obligation against said property in favor of Deseret Federal Savings and Loan with an unpaid balance of \$31,836.78, as of May 1, 1977.

. . .

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed nine (9%) percent per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to



be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by Seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

. . .

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise. (TR. 13 emphasis added)

On or about July 1, 1978 Plaintiff contacted Defendants directly and explained that she had reduced the principal balance to the amount of the Deseret Federal Savings and Loan obligation, had made arrangements with that institution to assume that loan, and requested that Defendants transfer title to her pursuant to paragraph 8 of the contract. (TR. 51, 52) As of that date Plaintiff had made payments reducing the unpaid balance on said contract to the sum of \$31,368.40 which was equal to or less than the amount owing on the Deseret Federal Savings and Loan obligation which was created prior

to Plaintiff's purchase of the property, existing as set forth in paragraphs 6 and 8 of the contract and which was the only outstanding obligation against the property. (TR. 51) Defendants refused and failed to transfer title to the property. (TR. 52) Because of Defendants failure to transfer title at that time Plaintiff is presently unable to assume said obligation without incurring much higher interest expenses. (TR. 52) Subsequent to said refusal and since the filing of this lawsuit Defendants by affidavit of Kathryn P. Hinkle have admitted that paragraph 8 of the Uniform Real Estate Contract provides that buyer (Plaintiff) has a right to undertake the principal mortgage held by seller (Defendants) and allege generally for the first time that certain terms and conditions precedent to transfer remained unfulfilled. (TR. 44)

Defendants have further admitted receipt of payments made pursuant to the contract as follows:

|          |                            |
|----------|----------------------------|
| 6/30/77  | \$313.65                   |
| 7/10/77  | 313.60                     |
| 8/10/77  | 313.60                     |
| 9/6/77   | 313.60                     |
| 10/12/77 | 313.60                     |
| 11/8/77  | 313.60                     |
| 12/8/77  | 313.60                     |
| 1/20/78  | 338.60                     |
| 2/10/78  | 338.60                     |
| 3/6/78   | 338.60                     |
| 4/11/78  | 8,863.33 (balloon payment) |

|         |          |
|---------|----------|
| 5/30/78 | \$338.60 |
| 6/12/78 | 338.65   |
| 7/78    | 338.60   |
| 8/78    | 338.60   |
| 9/78    | 338.60   |
| 10/78   | 338.60   |
| 11/78   | 338.60   |
| 12/78   | 338.60   |
| 1/79    | 338.60   |
| 2/79    | 347.60   |

(TR. 38, 39)

Plaintiff continued to make payments on said property as they became due. (TR. 52)

It is Defendant's position as set forth in the affidavit of Kathryn P. Hinkle that Plaintiff has nothing to gain in effecting said title transfer and that Defendants stand to lose a sum in excess of \$4,000.00 because the rate of interest that Plaintiff pays Defendants according to the contract is less than the rate of interest Defendants pay on the obligation to Deseret Federal Savings and Loan. (TR. 45).

Plaintiff brought this action November 1, 1978 by filing a complaint alleging that the conditions of the contract found in paragraph 8 with respect to reduction of the principal balance and assumption of outstanding obligations had been complied with; that demand for conveyance had been made upon Defendants; that Defendants failed and refused to transfer the property; that Plaintiff is entitled to specific perform-

ance and damages caused to her by delay of Defendants. Defendants answered the complaint denying that Defendants had any obligation to convey title to the property and alleging that the terms of paragraph 8 of the contract excluded from their application the Deseret Federal Savings and Loan obligation which was set forth as an existing obligation in paragraph 6 of the contract. Defendants generally denied the remaining essential elements of Plaintiff's claim and counterclaimed for attorney fees. Plaintiff replied to the counterclaim denying Defendants' claim for attorney fees.

Defendants answered Plaintiff's requests for admissions April 11, 1979 and filed a Motion for Summary Judgment supported by the affidavits of Howard J. Swapp and Kathryn P. Hinkle on May 2, 1979.

May 15, 1979 Plaintiff filed a Motion for Summary Judgment supported by the affidavit of Terry Lynne Jones.

May 17, 1979 the court heard both motions, denying Plaintiff's motion, granting Defendants' motion and awarding an attorney fee to Defendants.

May 22, 1979 Plaintiff filed a Motion to Reconsider which was denied by the court on June 1, 1979.

## ISSUES

1. The district court erred in interpreting the contract to state that Plaintiff had no right to assume the obligation set forth in paragraph 6 of the contract pursuant to the terms of paragraph 8.

*Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act administered by the Utah State Library. Machine-generated OCR, may contain errors.*

2. The district court should have held that according

.to the terms of the contract Plaintiff has an absolute right to assume the obligation set forth in paragraph 6 of the contract when the terms of paragraph 8 are fulfilled.

3. Defendants are liable for any damages to Plaintiff caused by their refusal to transfer title according to the terms of the contract.

4. The district court erred in awarding Defendants an attorney fee based upon paragraph 21 of the contract because as a condition precedent to the award of attorney fees a finding must be made that a party is in default in a covenant or agreement contained in the contract.

5. The district court should have awarded Plaintiff an attorney fee based upon paragraph 21 of the contract.

#### ARGUMENT

##### POINT I

THE LOWER COURT ERRED IN HOLDING THAT  
PLAINTIFF-APPELLANT HAD NO RIGHT TO ASSUME  
THE UNDERLYING OBLIGATION ON THE REAL PROPERTY.

The contract specifically gives Plaintiff, as buyer, the right to have seller convey title to the property at such time as the principal due on the contract is reduced to the amount outstanding on any loans and mortgages secured or maintained by Seller on the property pursuant to the provisions of paragraph 8 of the contract, including the Deseret Federal Savings and Loan mortgage specifically identified in paragraph 6. In the lower court Defendants argued, apparently persuading the court, that the provisions of paragraph 8 of the contract respecting Buyer's right to have Seller convey title to her do

not apply to the Deseret Federal Savings and Loan mortgage maintained by Defendants as set forth in paragraph 6.

Plaintiff contends and stated by affidavit that the conditions specified in paragraph 8 of the contract had been complied with and that therefore she had a right to have Defendants convey title to the property to her.

Defendants through the affidavit of Kathryn P. Hinkle admit Plaintiff's right to title but generally deny that the conditions precedent had been met. This presents a genuine issue as to material facts, on its face precluding summary judgment, (see discussion under Point II, Supra.) Yet the court ruled as a matter of law that Plaintiff had no right to have title conveyed to her under any circumstances. This conclusion flies in the face of the clear language of the contract which this court can determine as the trial court could without being bound by the trial court's conclusion. Kier v. Condrack, 24 U.2d 139, 478 P.2d 327, (1970). Hartman v. Potter, No. 16004, (Utah, filed June 1, 1979).

Paragraph 6 of the contract sets forth the fact of the existing Deseret Federal Savings and Loan obligation against the property. Paragraph 8 specifically authorizes Seller to secure, execute and maintain loans against the property under certain conditions. By the principle of ejusdem generis it is understood that the loans referred to in paragraph 8 are of the same type and kind as the loan specifically referred to previously.

Paragraph 8 then goes on to state:

*Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.  
Machine-generated OCR, may contain errors.*

"When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages".

Blacks Law Dictionary defines "Ejusdem Generis" as follows:

In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their wildest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . . The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Blacks Law Dictionary, West Publishing Company, 4th Edition. p. 608, 1951.

The contract in question specified the Deseret Federal Savings and Loan obligation in paragraph 6, identifying for buyer the true state of the title to the property. Paragraph 7 states respecting the title that there are no unpaid special improvement taxes on the property. Paragraph 8 then authorizes Seller to secure, execute and maintain loans and mortgages secured by the property, i.e. obligations of the same kind and including the one discussed in the preceding section. Seller is specifically authorized to maintain that loan, subject to Seller's agreement to convey and Buyer's agreement to accept title when the amount that Buyer owes on the contract is equal to the amount Seller owes on obligations secured by the property. To exclude the principal obligation against the property from the operation of this clause would mean that Buyer might have to accept title to the property while Seller

still had the benefit of a \$30,000.00 loan secured by property now in Buyer's name, which Buyer would stand to loose in the event of Seller's default on the obligation. Such a construction would be contrary to the overall terms of the instrument and the obvious intent of the parties.

It is Plaintiff's position that the contract means what it says. It is apparently Defendants' position that the contract means something else. Although neither party has claimed that the contract is ambiguous, the respective positions of the parties imply that the court need interpret the contract. Hartman v. Potter, supra.

The basic rules for contract interpretation have been set forth by the Utah Supreme Court:

"This intent should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writings concerning the same subject matter, and third from the extrinsic parol evidence of the intentions." Continental Bank and Trust Company v. Bybee, 6 U.2d 98, 306 P.2d 773, (1957).

Examination of the instrument itself shows in paragraph 3 that the payment schedule contains an exactly calculated balloon payment in the amount of \$8,163.22 to be made on or before May 12, 1978. This payment was calculated by Defendants, who drafted the document, to reduce the principal balance of the contract to an amount exactly equaling the balance payable to Deseret Federal Savings and Loan at that time. This was to facilitate the intent of the parties at the time the contract was drafted, namely that Plaintiff would assume the Deseret Federal Savings and Loan obligation at that time and Defendants would convey



title to the property to Plaintiff. (TR. 28, 53) The payment schedule supports Plaintiff's contention that Defendants have breached the contract in failing to convey title to the property to Plaintiff.

In addition, paragraph 9 of the instrument sets forth additional options for buyer to accelerate conveyance of the property.

The Uniform Real Estate Contract by its terms supports Plaintiff's contention that Buyer had a right to have Sellers convey title to her pursuant to the terms of paragraph 8. The issue of whether or not the provisions of paragraph 8 were met by Plaintiff was not considered by the lower court although raised by both parties.

No contemporaneous writings of the parties were introduced into evidence before the lower court. Parol evidence was submitted by both parties in the form of affidavits. Plaintiff's affidavit supports her contention that she had a right to conveyance from Defendants and specifically asserts that all conditions precedent were performed by her. The affidavit of Kathryn P. Hinkle also supports Plaintiff's contention that she has a right to conveyance but generally denies performance of the conditions precedent.

"3. That paragraph 8 provides that buyer may undertake the principal mortgage held by the seller under certain terms and conditions and that none of the terms and conditions required were fulfilled herein, and, therefore, buyers have no right, under paragraph 8, to assume Seller's mortgage." (TR. 44, 45).

Under the standard set by this court in Continental Bank and Trust Co., supra, all of the evidence supports Plaintiff's position that she had a right to have the property conveyed to her and the evidence, which of course should be viewed in the light most favorable to Plaintiff, raises a most material question of fact concerning the performance of the conditions set forth in paragraph 8 of the contract.

It is elemental that the result be as intended by the parties and that neither party obtain an unfair advantage by varying the terms of the contract. To deprive Plaintiff of her right to have title conveyed to her would create such a situation which this court handled in the case of Kier v. Condrack, supra,

We recognize the validity of the rule relied upon by the defendants that to be enforceable a contract must be sufficiently definite in its terms that the parties know what is required of them. But like all rules, which are necessarily stated in generality, it is only applicable in the proper circumstances, where the justice of the case requires: as a shield to protect a party from an injustice and not as a weapon with which to perpetrate an injustice. . . . when the parties had reached agreement and committed themselves on the major aspects of the transaction, that is, that the defendants would sell and the plaintiff would buy at the agreed price of \$23,500, if the plaintiff exercised the option within the time specified, reserving only the "terms" of payment, they should be obliged to act in good faith in keeping their promise. It would seem inequitable and unjust to permit a seller to simply refuse unreasonably to justify his refusal. . . . neither party should be permitted to use the reservation of "terms" to get more than they had promised: the plaintiff to get more land, or the defendants to get more money. nor either to renege on the bargain. . . . p. 142, 143

The court should interpret the contract to reflect the intent of the parties and the intent is shown as set forth above to the effect that Plaintiff was entitled to conveyance of title from Defendants upon demand and when the conditions precedent of paragraph 8 were performed. Continental Bank and Trust Company, supra, Kier v. Condrack, supra., Oregon Shortline Railroad Company v. Idaho Stockyard Co., 124 U.2d 205, 365 P.2d 826, (1961).

Plaintiff simply submits that the contract language should be given its usual and ordinary meaning, and that the entire body of the contract and the subsequent acts of the parties support that meaning. Daly v. Old, 35 Utah 74, 99 Pac. 460, (1909).

#### POINT II

#### IT WAS IMPROPER TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Summary judgment for Defendants as granted by the lower court was improper and contrary to Rule 56(c) U.R.C.P. and the large body of opinion supplementing that rule.

In a case very similar to the instant case, Sandberg v. Klein, 576 P.2d 1291, (Utah, 1978) the Plaintiff sued to have an option to purchase real property declared expired and the Defendant alleged full performance of all conditions. The matter was submitted to the court by motion and affidavit, upon which the trial court entered findings, conclusions and judgment in favor of the Plaintiff. The Supreme Court reversed, relying on 1) performance of the parties, 2) the equivocal acts

of the parties and 3) the need to resolve questions of the intent of the parties holding:

A summary judgment can only be granted under Rule 56(c), U.R.C.P., when it is shown there is no genuine issue as to any material fact, and the moving party is entitled to judgment, as a matter of law, under the operative facts. The court cannot consider the weight of testimony or the credibility of witnesses in considering a motion for summary judgment. Herein although the parties were not in complete conflict as to certain facts, the understanding, intention, and consequences of those facts were vigorously disputed. These matters can only be resolved by a trial. p. 1291

. . .

There are basic unresolved issues which prevent a summary judgment.

In the case of Holbrook Co. v. Adams, 542 P.2d 191, (Utah, 1975), this court held:

It only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. . . . if there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted. p. 193

This is the case in the instant matter. The lower court improperly granted Defendants' Motion for Summary Judgment. Plaintiff submits that the court holding in Western Pacific Transport Co. v. Beehive State Agricultural Co-op, No. 16056, (Utah, filed June 26, 1979) is also applicable to this case.

We are entirely cognizant of the advantages of the summary judgment procedure in saving the time, effort and expense of a trial when it clearly appears that there are no disputed issues of material facts and the court can therefore rule for the moving party as a matter of law. However, the granting of such a motion fails of that objective, and the hoped for advantages are not only lost, but there actually re-

sults a greater expenditure of time and effort if there are such disputed issues to be resolved and the granting of such a motion is not justified. From what has been set forth above, it should be plain that in this case there are such disputed issues which ought to be tried. The motion was improperly granted and it is necessary that the case be remanded for trial. Costs to appellant (defendant).

### POINT III

#### THE LOWER COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE DEFENDANT AND NOT TO THE PLAINTIFF.

The lower court awarded attorney fees to Defendants pursuant to paragraph 21 of the contract. Said paragraph states:

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

Said clause provides for payment of attorney fees arising from default in the terms or covenants of the contract.

It is undisputed that Plaintiff is not now and has never been in default under the terms of the agreement. Defendants have had no need to enforce the agreement and it does not follow that Defendants be awarded attorney fees.


No finding was made by the court that Plaintiff was in default on the contract or that Defendants had any need to enforce the agreement, indeed no averments were made or affidavits submitted in support of any such allegation.

Defendants are in default under the terms of paragraph 8 of the contract for having refused to convey title and plaintiff should be awarded an attorney fee for bringing this action.

#### CONCLUSION

It is clear from the terms of the contract, the parties actions and the applicable law that the lower court's entry of summary judgment should be reversed as well as the lower court's award of attorney fees, Plaintiff has a right to conveyance of title under the contract and this matter should be remanded for trial on the issues of condition precedent to conveyance and damages.

RESPECTFULLY SUBMITTED this 25 day of September, 1979.



---

Joseph L. Henriod  
Stephen L. Henriod  
NIELSEN, HENRIOD, GOTTFREDSON & PECK  
Attorneys for Plaintiff  
400 Newhouse Building  
Salt Lake City, Utah 84111

#### CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mr. Dean L. Gray, Attorney for Defendants, 1000 Boston Building, Salt Lake City, Utah 84111, postage prepaid this 25 day of September, 1979.



---

SEP 25 1979

FILED